Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1144

W. EARL DUNCAN, *et al.*,

Petitioners,

v.

FURROW AUCTION COMPANY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Petitioners for reply to the government's Memorandum in Opposition state as follows:

1. That in the cases cited by the government the contention was not made as it is in the instant case that the two subsections of 15 U.S.C. 634(b) must be read together, i.e., that the duty rests on the Administrator to act *reasonably* in selling or assigning any security assigned to him in connection with the payment of loans granted

under the act (subsection (b)(2)), and that in the absence of such reasonable actions the Administrator may be enjoined.

2. That such result is recognized in other Federal Statutes where in injunction is prohibited. Compare, *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 8 L.Ed.2d 292, 82 S.Ct. 1125 (1962) wherein this Court construed the following statute as it read at the time:

Section 7421(a) of the Internal Revenue Service Code of 1954, 26 U.S.C. §7421(a), before the latest Amendments which read:

> Except as provided in Sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The exceptions of the statute related to proceedings before the United States Tax Court which were not applicable in the *Enochs*, case because the claim in *Enochs* was for overassessment of social security and unemployment taxes which were not in the Tax Court's jurisdiction. In *Enochs* this Court, although holding that the government's claim was not without foundation on the facts, said as follows at 370 U.S. 7:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue, *Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the act is inapplicable and, under the Nut Margarine Case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the extraction is merely in the guise of a tax.* [Emphasis supplied]

Compare, *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 76 L.Ed. 422, 52 S.Ct. 260.

3. This case is not moot as pointed out on page 16 of Petitioners' Petition for a Writ of Certiorari filed herein because the petitioners have not received any assurance that the government and Advancement, Inc. will not seek deficiency judgments against Auto Vac Company, Inc. The deficiencies involved in this case are at least $26,000.00 as far as the Small Business Administration is concerned, and at least $26,000.00 as far as Advancement, Inc. is concerned.

It is, therefore, respectfully submitted that this Court should grant the petition for certiorari and hear the issues raised in this important question involved in the administration of the loan provisions supervised by the Small Business Administration.

Respectfully submitted,

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